

(c)-(f) (No change.)

#### 19:4-9.16 Conditions

Upon consideration of the factors of N.J.A.C. 19:4-9.14(a) and the purposes of this chapter, the [Chief Engineer] **decision** may [attach] **impose** such conditions to the granting of variances as [it] deem[s]ed necessary to reduce or minimize any potentially injurious effect of such variance upon other property in the neighborhood, and to carry out the general purpose and intent of this chapter. Failure to comply with any of the conditions or restrictions placed on a variance shall constitute a violation of this chapter.

#### 19:4-9.17 Written decision and records

A written decision on an application for a variance shall be rendered [within eight weeks of the date of the public hearing] **in accordance with the procedure specified in N.J.A.C. 19:4-4.14**. The Chief Engineer shall maintain complete records of all actions with respect to applications for variances, including technical information, and shall report any variances to the Federal Emergency Management Agency upon request.

#### 19:4-9.18 Appeals

An appeal from an adverse decision of the [Chief Engineer or Executive Director] **Commission** made pursuant to this subchapter may be made in accordance with the provisions of N.J.A.C. 19:4-[4.17]**4.19**.

#### 19:4-9.20 Buildings

(a) Residential construction: New construction and substantial improvement of any residential structure shall have the lowest floor elevated to a minimum of one foot above the base flood elevation. **Adequate drainage paths shall be provided around structures on slopes to guide floodwaters around and away from proposed structures.**

(b) Non-residential construction: New construction and substantial improvement of any commercial, industrial or other non-residential structure shall either have the lowest floor, **including basement**, elevated a minimum of one foot above the base flood elevation, **and have adequate drainage paths around structures on slopes to guide floodwaters around and away from proposed structures, or together with the attendant utilities and sanitary facilities shall:**

1. Be floodproofed, so that below the elevation equal to one foot above the base flood elevation, the structure is water tight with walls impermeable to the passage of water;

2.-3. (No change.)

(c) Manufactured homes shall be anchored in accordance with N.J.A.C. 19:4-9.23. [All manufactured homes shall be anchored to resist flotation, collapse or lateral movement. Methods of anchoring may include, but are not to be limited to, use of over-the-top or frame ties to ground anchors. This requirement is in addition to applicable State and local anchoring requirements for resisting wind forces.]

(d) (No change.)

#### 19:4-9.26 Enclosure openings

(a) For all new construction and substantial improvements, fully enclosed areas below the lowest floor that are **usable solely for parking of vehicles, building access or storage in an area other than a basement and that are** subject to flooding shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement must either be certified by a [registered] **licensed professional engineer or registered architect** or must meet or exceed the following minimum criteria:

1.-3. (No change.)

(a)

## DELAWARE RIVER BASIN COMMISSION

### Proposed Rulemaking

### Amendments to the Basin Regulations — Water Supply Charges and Comprehensive Plan Relating to Certificates of Entitlement

Authorized By Delaware River Basin Commission, Pamela M Bush, Esquire, Commission Secretary and Assistant General Counsel.

Proposal Number: PRN 2005-424.

**Take notice** that the Delaware River Basin Commission ("Commission" or "DRBC") is a Federal-state regional agency charged with managing the water resources of the Basin without regard to political boundaries. Its members are the governors of the four Basin states – New Jersey, New York, Pennsylvania and Delaware – and a Federal representative appointed by the President of the United States. The Commission is not subject to the requirements of the New Jersey State Administrative Procedures Act. This notice is published by the Commission for informational purposes.

**Summary:** The Commission will hold a **public hearing** to receive comments on proposed amendments to the Commission's Basin Regulations – Water Supply Charges and Comprehensive Plan concerning certificates of entitlement. No changes in the substance or administration of the rule are proposed. The purpose of the proposed amendments is to clarify the language of the rule to conform to the Commission's past decisions and current practices in order to provide better notice to users as to how the Commission is implementing its entitlements program and to avoid future controversy.

**Background:** The Delaware River Basin Compact ("Compact"), the 1961 statute that created the DRBC and defined its powers, authorizes the Commission to charge for the use of facilities that it may own or operate and for products and services rendered thereby. Compact, §3.7. Congress limited this authority by providing that the Commission cannot charge for water withdrawals or diversions that could lawfully have been made without charge as of the effective date of the Compact. *Id.*, §15.1(b).

By Resolution No. 64-16A in 1964 the Commission authorized a water charging program. It provided for the revenues generated by the program to be used for repayment of the nonfederal share of the investment cost of water supply storage facilities associated with federal projects within the Basin. In anticipation of Commission investment in storage at the Beltville Lake and Blue Marsh Reservoir projects in Pennsylvania, the Commission by Resolution No. 1971-4 defined, among other things, the means by which it would establish water charging rates. Consistent with Section 15.1(b) of the Compact, Resolution No. 1971-4 provided that charges would be applicable only to the amount of water withdrawn in excess of the amount taken or legally entitled to be taken by an entity during the preceding year. By Resolution No. 74-6, the Commission instituted a system of water supply charges for surface water withdrawals within the Basin. That resolution provided for the issuance of certificates of entitlement to then-current water users, establishing the amount of water each could lawfully take from the surface waters of the Basin without charge, consistent with Section 15.1(b) of the Compact. The resolution provided that a certificate of entitlement was not transferable, except under limited circumstances set forth in enumerated exceptions.

Because entitlements treat users that commenced water withdrawals before the enactment of the Compact more favorably than users who commenced water withdrawals later, even though all users benefit equally from the facilities financed by water supply charges, courts and the Commission have emphasized the need to eliminate entitlements over time. Both the Commission and the courts have construed narrowly the exceptions to the rule that entitlements are not transferable, and the Commission has in its decisions consistently held that changes in ownership or control would extinguish a certificate. However, the language of the regulations has never explicitly defined "changes in ownership or control." As a consequence, in the decisions that the Commission has been asked to make in its adjudicatory capacity and that

the courts have subsequently been asked to decide, the matter of what constitutes a change of ownership or control has been controversial.

In 1994, in response to a ruling by the Third Circuit in *Texaco Refining and Marketing Inc v DRBC*, 824 F. Supp. 500 (D.Del 1993), *aff'd*, No. 93-7475 (3d Cir June 24, 1994) (per curiam), the Commission adopted Resolution No. 94-20. That resolution incorporated an explicit "ownership and/or control" test and eliminated the merger exception included in the Commission's regulations at the time. In addition, the exception for corporate reorganizations embodied in Section 5.2.1.F.2 of the Water Charging Regulations was amended to apply only when the reorganization "does not affect ownership and/or control."

In spite of the 1994 amendment, some members of the Basin community have continued to interpret the language of the rule in a manner contrary to the Commission's consistent interpretation. To avoid further controversy, the Commission proposes a more thorough revision of the language, intended to remove any ambiguity.

In addition to defining "change in ownership and/or control" with much greater specificity, the proposed revisions also make clear that a merger at any tier in a corporate organization will extinguish a certificate held by a subsidiary in the same way as if the merger had occurred at the subsidiary level. Although the Commission has interpreted its rule this way in the past, the rules have never been explicit on this point.

The proposed amendments preserve and clarify the corporate reorganization exception contained in the current regulation. The Commission traditionally has not attempted to extinguish an entitlement in the case of an internal reorganization, and it does not propose a change in this practice.

The proposed amendments also preserve the existing exception for agricultural uses. Historically, agriculture has been treated differently than other uses. For purposes other than agriculture, an entitlement is issued to a user rather than for a use. In the case of agriculture, however, an entitlement effectively runs with the land, as long as the land remains in agriculture. The proposed amendments provide that an entitlement can be reissued to the successor of a certificate issued for agricultural water use, provided that the successor demonstrates that the water will continue to be used for agricultural purposes.

**Dates:** The public hearing on the proposed rule change will be held on Wednesday, December 7, 2005 at approximately 2:30 P.M. as part of the Commission's regularly scheduled business meeting. The time is approximate because the Commission will conduct hearings on several dockets (project approvals) beforehand, beginning at approximately 1:30 P.M. The hearing will continue until all those who wish to testify are afforded an opportunity to do so. In the event that all those who wish to testify cannot be heard on December 7, the hearing will be continued at a date, time and location to be announced by the Commission Chair that day. Persons wishing to testify at the hearing are asked to register in advance with the Commission Secretary by phoning 609-883-9500, extension 224. Written comments will be accepted through Tuesday, January 10, 2006.

**Addresses:** The public hearing will be held in the Goddard Room at the Commission's office building, located at 25 State Police Drive in West Trenton, New Jersey. Directions to the Commission's office building are posted on the Commission's website, <http://www.drbc.net>. Written comments should be addressed to the Commission Secretary as follows: by email to [paula.schmitt@drbc.state.nj.us](mailto:paula.schmitt@drbc.state.nj.us); by fax to the Commission Secretary - 609-883-9522; by U.S. Mail to the Commission Secretary, DRBC, PO Box 7360, West Trenton, NJ 08628-0360; or by overnight mail to the Commission Secretary, DRBC, 25 State Police Drive, West Trenton, NJ 08628-0360.

**Additional Information. Contact:** The full text of the proposed amendment and the text of the current regulation are posted on the Commission's website, <http://www.drbc.net>.

(a)

## NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

### NEW JERSEY SCHOOLS CONSTRUCTION CORPORATION

#### Notice of Administrative Correction and Extension of Public Comment Period

#### Procedures for Bidding for the New Jersey Schools Construction Corporation's School Facilities Projects for the Schools Construction Program

#### Proposed New Rules: N.J.A.C. 19:38

**Take notice** that the New Jersey Schools Construction Corporation discovered an error in the notice of proposal for proposed new rules N.J.A.C. 19:38 published in the October 3, 2005 New Jersey Register at 37 N.J.R. 3801(a). Due to the page-width table in N.J.A.C. 19:38-3.5(b), the elements of N.J.A.C. 19:38-3.4 and 3.5 published at 37 N.J.R. 3805 do not appear in the Register-standard left column to right column. As such publication may result in difficulty in interpretation of those elements, this notice of administrative correction provides the proposed text of those two sections in clearer left-to-right column format. This notice of administrative correction is published pursuant to N.J.A.C. 1:30-2.7.

**Take further notice** that the New Jersey Schools Construction Corporation is extending the public comment period on the notice of proposal from December 2, 2005 to January 6, 2006. Submit written comments by January 6, 2006 to:

Barbara J. Bohi, Esq.  
Managing Director, Policy, Planning & Legal Affairs  
New Jersey Schools Construction Corporation  
PO Box 991  
Trenton, New Jersey 08625-0991

**Full text** of corrected proposed N.J.A.C. 19:38-3.4 and 3.5 follows:

#### 19:38-3.4 Calculation of the Project Rating

(a) Firms shall supply the information required for the calculation of a Project Rating in the trade for which the firm is seeking a Project Rating. The Project Rating shall be based on the following factors:

1. A check of references supplied by the firm on projects completed by the firm in the past seven years. This includes information regarding the firm's performance on other school facilities projects;
2. Information regarding the firm's safety record;
3. Information regarding the firm's prevailing wage record;
4. The firm's corporation project evaluation record; and
5. Other information deemed relevant by the Corporation.

#### 19:38-3.5 Determination of Project Rating

(a) A firm's Project Rating for the trade shall be determined by the following:

$$A \times (100\% + B + C + D) \times E$$

where:

A = the firm's largest completed project in a specific trade listed in the Project Rating Proposal

B = the sum of the Reference Adjustment calculated pursuant to this chapter

C = the Safety Adjustment calculated pursuant this chapter

D = the Prevailing Wage Adjustment calculated pursuant to this chapter

E = the average of the firm's Project Evaluations

A firm's Project Rating for a trade cannot exceed the firm's Aggregate Rating and cannot exceed 170 percent of the firm's largest listed completed project.